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some highly-sanctioned opinions, in order to open the door of justice in this court to those who cannot obtain it elsewhere, I would not shrink from the responsibility of doing so."

CRUEL AND UNUSUAL PUNISHMENTS.

The death penalty for centuries has been the universal punishment for many crimes. In the medieval period even the most trivial breaches of the law were atoned for by the death of the culprit. The advance of civilization, however, has been marked by the decline of capital punishment, until in the majority of jurisdictions it is imposed only in cases of treason and murder.

Notwithstanding the great abhorrence for capital punishment, the legislatures of many states, incited by the prevalence of certain crimes or the particularly distressing details of some one crime, in their respective states, have recently passed statutes imposing the death penalty for crimes not usually punished with so great severity. Notably, the Illinois statute, making kidnapping punishable by death.

In view of this spirit of the legislatures, the case of *Territory v. Ketchum*, 65 Pac. (N. Mex.) 169, becomes of more than passing interest, since it raises the question of the limit to legislative discretion in determining the severity of punishment of crime.

In this case the appellant was convicted of train robbery and sentenced to death, in accordance with the provisions of Section 1151 of the Compiled Laws of New Mexico. The single question presented to the Supreme Court, was whether the death penalty, as applied to this offense, is a "cruel and unusual punishment," within the prohibition of the eighth amendment to the Constitution of the United States. The court decides that the section of the Compiled Laws in question is not within the constitutional provision.

When the enormity of the crime is considered, the decision does not impress one as unjust nor the punishment disproportionate. But in arriving at this conclusion the court states that the discretion of legislatures in determining the adequacy of punishment for crime is unlimited.

Is this true, as a principle of law? If so, to apply it in an extreme case, the legislatures may impose the death penalty forever a misdemeanor.

If there is any limitation upon this power of legislatures, it must be imposed by the eighth amendment of the Constitution of the United States or similar provisions in the state constitutions.

That this provision applies to punishments of a barbarous character, such as burning at the stake and stretching on the rack, is beyond doubt (*Wilkerson v. Utah*, 99 U. S. 130). That the death penalty, in a proper case, if the mode of infliction is humane, is not prohibited by this provision is equally well established. (*In re Kemmler*, 136 U. S. 436).

But when it is sought to invoke the aid of this constitutional provision, to prevent the infliction of punishment, excessive and disproportionate to the crime committed, the law is not so well defined.

This point has not been passed upon by the United States Supreme Court. In the state courts, however, where the precise question has arisen, the decisions have been uniform, that the provision against "cruel and unusual punishments" is applicable to the mode of punishment and not to the decree. (*Aldridge v. Com.*, 2 Va. Cas. 447; *Com. v. Hutchings*, 5 Gray 482; *Com. v. Murphy*, 165 Mass. 66; *People v. Morris*, 80 Mich. 634).

Such eminent authorities as Judge Cooley and Mr. Tiedeman declare the question an open one. While a review of the authorities would thus seem to confirm the decision of the Supreme Court of New Mexico, nevertheless, some idea of the probable decision of the question, should it ever be presented to the Supreme Court of the United States, may be obtained from the dissenting opinion of Justice Field in *O'Neil v. Vermont*, 144 U. S. 323, which was concurred in by Justices Harlan and Brewer. Justice Field, after speaking of the application of the eighth amendment to the punishments involving torture, said, "The inhibition is directed not only against punishments of the character mentioned, but against all punishments which, by their excessive length or severity, are greatly disproportioned to the offense charged."